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No. 93-1793

In The

Supreme Court of the United States

October Term, 1994

COMMERCIAL LIFE INSURANCE COMPANY,

Petitioner,

v.

LONNIE TOLLEY,

Respondent.

COMMERCIAL LIFE INSURANCE COMPANY,

Petitioner,

v.

ALLEN SHELTON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Lonnie Tolley and Allen Shelton, submit this brief in support of their request that this Court deny the Petition for Writ of Certiorari filed by Commercial Life Insurance Company of Newark, N.J., which seeks review of the opinion of the Sixth Circuit Court of Appeals.

STATEMENT OF THE CASE

The respondents, Lonnie Tolley and Allen Shelton, are former employees of Nuclear Fuel Services, Inc. ("NFS"), a manufacturer of nuclear fuel for submarines, located in Erwin, Tennessee. Both gentlemen were participants in a Voluntary Accident Insurance Plan for Hourly Employees provided by the defendant Commercial Life Insurance Company (the "Plan"). Both gentlemen suffered permanent disabilities as a result of accidents which occurred while they were on the job, and both were ultimately denied benefits under the Plan. They then brought separate actions under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. The District Court for the Eastern District of Tennessee at Greeneville granted summary judgment to the petitioner Commercial Life in both cases, based upon the finding that both respondents suffered from prior back injuries which precluded coverage under the Plan. Both respondents appealed, and their cases were consolidated on appeal to the Sixth Circuit. The respondents and the defendant have both stipulated that these actions are governed by ERISA. The parties have further stipulated

that Mr. Tolley and Mr. Shelton have exhausted all of the administrative remedies and procedures of the Plan and that the United States District Court has jurisdiction over these matters.

From 1966 until February 28, 1989, Lonnie Tolley was employed as a production operator at Nuclear Fuel Services, Inc. (TR.2,112,117,167,192,659). Mr. Tolley's job consisted of charging furnaces, screening material, making up charges of powder for reductions, charging dissolvers and screening and classifying powder. (TR.104,587). In order to perform these job tasks he was routinely required to lift heavy objects. On February 28, 1989 while on the job and while performing his described duties, Mr. Tolley lifted a tank suspended by ropes and experienced low back pain that radiated into his right leg. (TR.112,167,583,584). He was treated conservatively by Dr. Calvin Johnson, a local orthopaedic surgeon, from the time of his injury until May 8, 1989, at which time Dr. Johnson removed him from the work force. (TR.112,167). On August 29, 1989 Mr. Tolley underwent a discography and percutaneous diskectomy. These procedures confirmed the injury to Mr. Tolley's back, and he subsequently underwent a multiple lumbar discography at L5-S1. (TR.114,135). After his surgery Mr. Tolley was not able to return to his former employment, nor to any other employment. Dr. Norman Hankins, a vocational expert, confirmed Mr. Tolley's impairments, conditions and restrictions, as did his treating and independent physicians. (TR.157-179,192-199,216-217,219-221). Dr. Hankins, the Social Security Administration and the Long Term Disability Insurance Carrier all agreed that Mr. Tolley

was totally disabled from engaging in any occupation for which he was qualified. (TR.192-199,659-667).

It is noted that prior to his disabling accident of February 28, 1989, Mr. Tolley suffered two minor injuries to his back. One of these injuries occurred on September 28, 1982 and the other on April 12, 1984. Neither injury required him to miss a significant number of work days. (TR.216,223,572-574). After both of these episodes, Mr. Tolley returned to his job with no restrictions and was able to, and did, perform a full range of normal activities. (TR.216,223).

Allen Shelton was a chemical operator at NFS from 1976 until September 1989. Mr. Shelton's job description consisted of charging furnaces and dissolvers as well as handling powders and materials in the manufacturing process. (TR.1-125).

On November 4, 1977, Mr. Shelton suffered an accident to his back that required him to have surgery for a ruptured disc. (TR.1-17). He subsequently returned to his job with certain restrictions by his treating physician, but otherwise performed a full range of normal activities. (TR.1-17,1-20,1-41,1-49,1-56,1-249,1-260,1-261). It is noted however, that the NFS doctor returned him to work without placing any restrictions upon him. (TR.1-41). Mr. Shelton continued to work at NFS until January 19, 1987, when he again injured his back in a car wreck. He received conservative treatment for this injury until February 23, 1987, when he was given a physical and released to go back to his work without restriction. (TR.1-68,1-249,1-260,1-261,1-265).

Mr. Shelton's final injury occurred on September 13, 1988. While on the job performing his normal job tasks, he lifted a 60 to 70 pound tube and experienced low back pain that radiated into his left hip and leg. (TR.1-157,1-216,1-221,1-180,1-231). He was treated conservatively by Dr. William Kennedy, a local orthopaedic surgeon, until December 5, 1988. (TR.1-292 through 297,1-176 through 211). On that date Mr. Shelton underwent a multiple level discography confirming his back injury and then underwent a total disc replacement at the L-5 level. (TR.1-187). Following his surgery Mr. Shelton never returned to his former employment and was not able to perform any other subsequent employment. (See Answer to Plaintiff's Interrogatory #19,TR.1-148,1-223 through 230,1-136,1-142,1-143,1-144). Dr. Norman Hankins, a vocational expert, confirmed Mr. Shelton's impairments, conditions, and restrictions as did his treating and independent physicians. (TR.1-194,1-195,1-197,1-232,1-233 through 235,1-223 through 230).

On June 25, 1990 Mr. Tolley filed a claim with the petitioner for accidental death and dismemberment benefits pursuant to the Plan, which was sold by the petitioner to employees of NFS. (TR.595-597,658). On August 2, 1989 Mr. Shelton filed the same type of claim with the petitioner under this same Plan. (TR.1-271 through 276). The Plan provided for benefits for total disability as follows:

PERMANENT TOTAL DISABILITY (Employee Only)

> If injury occurring after the effective date of coverage and commencing within 365 days after an accident causes continuous total disability for 12 consecutive months and you are judged to be permanently and totally disabled (unable to engage in each and every occupation or employment for compensation or profit for which you are reasonably qualified by reason of your education, training or experience), you will be paid the Principal Sum less any amount paid or payable under the policy as the result of the same accident.

NFS provided documentation to the petitioner which showed that both Mr. Tolley and Mr. Shelton had been participants in the Plan and had paid all their necessary premiums. The principal sum payable to both respondents under the Plan was $250,000. (TR.595-597; TR.1-276).

On September 10, 1990 and on October 26, 1990 the petitioner denied Mr. Tolley's claim under the Plan by separate letters sent to Mr. Tolley's attorney. The reasons for the claim denial appeared to be based upon the following factors:

1. Mr. Tolley was not totally disabled from any occupation;

2. Mr. Tolley suffered from osteoarthritis in the lumbar spine and was therefore excluded from recovering by language in the Plan which excluded loss resulting from disease;

3. Mr. Tolley did not sustain an "accidental injury";

4. Any disability from which Mr. Tolley suffered did not result directly and independently of all other causes from bodily injuries occurring while the policy was in force; and/or

5. The petitioner did not receive proper notice of Mr. Tolley's injury. (TR.649-651).

Mr. Tolley filed suit in the United States District Court pursuant to ERISA, and both parties filed motions for summary judgment pursuant to Fed.R.Civ.P. 56. On October 27, 1992 the district court granted summary judgment in favor of the petitioner, holding as follows:

> However, in the instant case, there is no need to determine whether Mr. Tolley's injury was caused by "accidental means" or whether or not he is totally disabled within the meaning of the policy. It is clear from the evidence in the record that his disability was caused, at least in part, by his pre-existing back condition which is certainly a "bodily infirmity". Under the plain language of the policy, his injury of February 1989, was not caused "directly and independently of all other causes" by his lifting of the heavy object.
>
> Based upon its review of the entire record before the plan administrator, the court is satisfied that Commercial Life's motion for summary judgment is well taken and should be granted.

Tolley v. Commercial Life Insurance Company, EDTN, Civ.2-92-42 (Oct. 27, 1992).

As with Mr. Tolley, Mr. Shelton's claims were also denied by the petitioner, by two separate letters sent to

Mr. Shelton's attorney dated December 29, 1989 and February 9, 1990. The reasons for denial appeared to be that:

1. Mr. Shelton was not totally disabled from any occupation;

2. Mr. Shelton suffered from degenerative disc disease and therefore was excluded by language in the Plan excluding loss resulting from disease;

3. Mr. Shelton did not sustain an accidental injury; and/or

4. Any disability did not result directly and independently of all other causes from bodily injuries occurring while the policy was in force. (TR.1-279,1-287).

Subsequently, Mr. Shelton filed suit in the United States District Court pursuant to ERISA. Both parties filed motions for summary judgment pursuant to Fed.R.Civ.P. 56. On October 30, 1992 the district court granted summary judgment in favor of the petitioner. The district court held as follows:

> However, in the instant case, there is no need to determine whether Mr. Shelton's injury was caused by "accidental means" or whether or not he is totally disabled within the meaning of the policy. It is apparent from the totality of the evidence in the record that his disability was caused, at least in part, by his pre-existing back condition which is certainly a "bodily infirmity". Under the plain language of the policy, his injury of September 1988, was not caused "directly and independently of all other causes" by his lifting of the heavy object.

> Based upon its review of the entire record before the plan administrator, the Court is satisfied that Commercial Life's motion for summary judgment is well taken and should be granted.

Shelton v. Commercial Life Insurance Company, EDTN, Civ.2-90-88 (Oct. 30, 1992).

Both Mr. Tolley and Mr. Shelton appealed as of right to the United States Court of Appeals for the Sixth Circuit pursuant to Fed.R.Civ.P. 3 and 28 U.S.C. §§ 1291 and 1294. In December 1993 the Sixth Circuit Court of Appeals vacated the district court's order granting summary judgment in both cases and remanded them for de novo consideration of the Plan and both respondent's entitlement to benefits under the Plan.

SUMMARY OF ARGUMENT

The Sixth Circuit's interpretation of the ERISA Plan's insuring and exclusionary clauses does not conflict with interpretation by the Tenth Circuit, instead the Sixth Circuit's holding is based upon a prior decision from the Fourth Circuit. In addition, such decision does not violate the mandate that a uniform body of federal common law be developed and applied in the interpretation of ERISA plans.

ARGUMENT

The petitioner's arguments in support of its Petition for Writ of Certiorari revolve around its assertion that the

Sixth Circuit's interpretation of Plan language has created a conflict among the federal circuits, which in turn has caused a deviation from the Supreme Court's mandate that federal common law regulating ERISA welfare plans be uniform throughout the nation. These arguments are based on the premise that the Sixth Circuit's construction conflicts with the Tenth Circuit's interpretation of almost identical language in a different ERISA plan.

The petitioner relies upon *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479 (10th Cir. 1992) to support this assertion. However, this reliance upon *Winchester* is misplaced. The *Winchester* court did not apply "federal common law" to the ERISA plan it was interpreting. Instead, it made an evaluation of ERISA's requirements as to preemption of state law, and held that it was required to apply Utah state law principles, not federal common law, to interpret its plan language.[1] The petitioner argues that "ERISA and federal common law contract interpretation cannons do not countenance such polarized conclusions regarding the meaning of the same insuring and exclusionary provisions." Petitioner's brief, pg. 17. In a situation in which two different federal courts are attempting to apply universal federal common law principles, the petitioner's argument may be well taken. However, because the *Winchester* court was applying Utah state law, not federal common law, the petitioner's

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[1] Whether or not the *Winchester* court was correct in its analysis and subsequent application of state law has not been considered by the respondents, as that question is outside the scope of this petition.

argument does not apply to the arguably divergent outcomes found in these two cases.

As a component of the above argument, the petitioner asserts that the Tenth Circuit correctly interpreted the language in question, while the Sixth Circuit erred in its reading of such. In making this argument the petitioner again relies upon the findings of the *Winchester* court to support its argument. In *Winchester*, the insured suffered a heart attack on the job after participating in a required firefighting exercise. The Tenth Circuit found that "heart failure following planned exertion did not constitute 'accidental bodily injury' resulting 'independently of all other causes' such as bodily infirmity or disease." *Id.* at 1488. Obviously, a prior existing condition, such as heart disease, will substantially and materially contribute to a deadly heart attack. The *Winchester* court noted that the issue before it was "whether a heart attack occurring after exertion falls within the terms of an accident insurance policy". *Id.* at 1485. The bodily infirmity from which Mr. Winchester suffered, heart disease, substantially contributed to his injury and his death. As noted by the court, Mrs. Winchester's own expert noted that "people that have heart attacks generally have heart disease" and "that it was more likely than not that Mr. Winchester had preexisting heart disease". *Id.* at 1488.

But, heart disease can be distinguished from the injuries under consideration here. Previous back injuries which do not limit a person's present ability to work and as to which no determination of whether or how those injuries may have contributed to a present injury should not automatically preclude recovery under the Plan language.

The petitioner also argues that the Sixth Circuit erred by interpreting the term "bodily infirmity" after it had found that such term was not ambiguous and thereby, it "deviated from federal common law contract interpretation principles. . . . " *Id.* at 18.

In fact, the Sixth Circuit Court did examine the term "bodily infirmity" and determine that there is no ambiguity as to the meaning of that term. The court found that the term as used in the context of accident insurance, and as used in the Plan, meant "a defective condition of a substantial character which in some material degree impairs the physical condition and health of the applicant, and increases the chance of death, sickness, or accident against which the insurance company is asked to issue insurance." *Tolley v. Commercial Life Insurance Company*, Nos. 92-6490, 92-6514 (6th Cir., Dec. 17, 1993). But the court went on to hold that in order to preclude recovery such bodily infirmity must have substantially contributed to the disabling injury. Because there was no proof to the effect that the prior injuries of either respondent substantially or materially contributed to the injuries which ultimately rendered them disabled, the Court held that the exclusion in the Plan would not at this point preclude recovery.

It is noted that the Sixth Circuit's holding that there be some measurement of degree as in the evaluation of a "bodily infirmity" is not without legal precedence in federal circuit courts. In making its findings, the Sixth Circuit relied on the Fourth Circuit's decision in *Adkins v. Reliance Standard Life Insurance Company*, 917 F.2d 794 (4th Cir. 1990). As noted by the *Adkins* court,

> as at least some of the authority has noted, in order to recover under such policies as the one here involved, and with such a stringent construction, a claimant would have to be in perfect health at the time of his most recent injury before the policy would benefit him, and that, of course, is a condition hardly obtained, however devoutly to be wished.

Id. at 796. The Sixth Circuit held that the construction of the policy language as adopted in *Adkins* applied to the Tolley and Shelton cases. The construction applied in *Adkins* is as follows:

> [A] pre-existing infirmity or disease is not to be considered as a cause unless it substantially contributed to the disability or loss . . . [A] predisposition or "susceptibility" to injury, whether it results from congenital weakness or from previous illness or injury, does not necessarily amount to a substantial contributing cause. A mere "relationship" of undetermined degree is not enough.

Id. at 797, quoting *Colonial Life & Accident Ins. Co. v. Weartz*, 636 S.W.2d 891 (Ky.Ct.App.1982).

The Sixth Circuit held that the degree requirement should be applied as in *Adkins*. The question the district court must consider "is how much effect, if any, the [previous injuries of the respondent] had on [their] present condition of disability." *Id.* at 795. This is a reasonable requirement, supported by federal case law, and one that this Court should allow to stand.

Additionally, the petitioner argues that federal courts should not get into the business of rewriting ERISA plan

coverages and exclusions. The respondents wholeheartedly agree, but suggest that the federal courts must be given the freedom to interpret and construe such plans as they are written.

CONCLUSION

For the foregoing reasons, the respondents request that the petitioner's Writ be denied.

Respectfully submitted,

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